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4       PLANNED PARENTHOOD FEDERATION  
5       OF AMERICA, INC., et al.,

6       Plaintiffs,

7       v.

8       CENTER FOR MEDICAL PROGRESS,  
9       et al.,

10      Defendants.

11      Case No. 3:16-cv-00236-WHO

12      **PLAINTIFFS' MOTION FOR SANCTIONS**

1 Plaintiffs file this motion for sanctions under Federal Rule of Civil Procedure 37 because of  
 2 Defendants' flagrant violation of the Protective Order in this case by disclosing a transcript  
 3 designated "Highly Confidential - Attorneys' Eyes Only" ("AEO") to their expert without first  
 4 requesting permission, as required by the Order. Defendants' expert incorporated this highly  
 5 confidential information into his expert report, which Defendants then shared with Defendant David  
 6 Daleiden in further violation of the Order. Based on these and other similar violations, Plaintiffs  
 7 request that the Court (1) exclude the expert report, or alternatively, strike portions of the report that  
 8 cite or rely on the transcript; (2) hold Defendants in contempt; and (3) order monetary sanctions.

9 **STATEMENT OF FACTS**

10 On August 31, 2016, this Court entered a Protective Order, which allows the parties to  
 11 designate documents as AEO where disclosure "is likely to cause a substantial risk of serious  
 12 injury." Dkt. 117, §2.6. The AEO provisions of the Protective Order are intended to preclude the  
 13 named Defendants from reviewing materials designated as AEO to protect Plaintiffs and their  
 14 employees from the risk of serious injury that could be caused by disclosure. Under the Protective  
 15 Order, a party wishing to disclose AEO documents to their experts:

16 [F]irst must make a written request to the Designating Party that (1) identifies the  
 17 specific "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" information that the Receiving Party seeks to disclose to the Expert; (2) sets forth  
 18 the full name of the Expert and the city and state of his or her primary residence, (3) attaches the Expert's fully executed Expert/Consultant Acknowledgment of  
 19 Confidentiality and Agreement to Be Bound by Protective Order (attached hereto as Exhibit A-2); and (4) attaches a copy of the Expert's current resume . . . .

20 *Id.* §8.6(b). The Receiving Party is only permitted to disclose the AEO documents if it does not  
 21 receive a written objection within seven days of the request. *Id.* §8.6(c).

22 Despite these procedures, Defendants' counsel provided multiple experts with multiple  
 23 documents designated as AEO (the "Disclosed Documents") without seeking permission, or  
 24 providing any of the information required under § 8.6(b). One of these Disclosed Documents--a  
 25 transcript of testimony of Dr. Deborah Nucatola, a Planned Parenthood employee, before the United  
 26 States House Select Investigative Panel ("Nucatola Transcript")--was produced by non-party  
 27 Nucatola as AEO (subject to the Protective Order in this case) only after she was compelled to do so  
 28 in a separate proceeding. Exhibit B. The court warned Defendants to be careful with the transcript.

1 Exhibit C.

2 Defendants admitted their violations of the Protective Order in an email to Plaintiffs and Dr.  
 3 Nucatola's counsel. Exhibit A. They admitted they gave their expert, Dr. Forrest Smith, the  
 4 Nucatola Transcript, which he incorporated into his report, and conceded that he relied on and  
 5 quoted extensively from it. *See Exhibit A; Bomse Decl. ¶13.* To compound their first violation,  
 6 Defendants also admitted that they had then given Mr. Daleiden a copy of Dr. Smith's report.<sup>1</sup>  
 7 Exhibit A.

8 This is not the first time Defendants disclosed protected information in violation of a court  
 9 order. In direct violation of an injunction ordered by this Court, Mr. Daleiden and his criminal  
 10 counsel obtained copies of enjoined recordings, posted YouTube links to some or all of those  
 11 recordings, and published names of recorded individuals. *See NAF Dkt. 409.* This Court found Mr.  
 12 Daleiden in civil contempt for "violating the clear mandate" of the injunction multiple times and  
 13 imposed sanctions.<sup>2</sup> NAF Dkt. 482 at 21-23; NAF Dkt. 495. Defendants' disregard of this court's  
 14 orders has impacted the safety of Plaintiffs' current and former employees.

15 **ARGUMENT**

16 **THIS COURT SHOULD IMPOSE SANCTIONS FOR**  
**DEFENDANTS' VIOLATION OF THE PROTECTIVE ORDER**

17 Defendants' admitted blatant violations of the Protective Order warrant sanctions to  
 18 adequately protect Plaintiffs, Plaintiffs' employees, and the non-party witnesses in this case, as well  
 19 as the integrity of this Court's orders. Federal Rule of Civil Procedure 37(b) authorizes sanctions  
 20 for failure to comply with discovery orders, including protective orders. *See, e.g., Westinghouse*  
*Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 935 (9th Cir. 1993) ("Rule 37(b)(2)  
 21 should provide comprehensively for enforcement of all [discovery] orders,' including Rule 26(c)  
 22

23  
 24 <sup>1</sup> Defendants did not disclose in their email regarding the Nucatola Transcript that they had  
 25 provided other AEO documents to their experts without requesting permission. Only after an email  
 26 from Plaintiffs asking about other AEO disclosures to experts did Defendants admit that they had  
 27 provided additional AEO documents to experts Dr. Smith and Mr. Zimmer. Exhibit D.

28 <sup>2</sup> Defendant Daleiden continues to publicize the cases against him, including discussing upcoming  
 29 depositions of Planned Parenthood witnesses, which increases the risk of disclosure of this AEO  
 30 information. *See Decl. of Amy Bomse ISO Motion for Sanctions ("Bomse Decl.") ¶15.*

1 protective orders.”)(citations omitted); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770,  
 2 784 (9th Cir. 1983) (upholding sanctions under Rule 37(b) for violation of protective order).

3 Defendants’ counsel do not dispute that they provided AEO documents to their experts  
 4 without seeking permission--a clear violation of § 8.6(b) and (c) of the Protective Order. Nor do  
 5 they dispute that they then provided the expert reports incorporating those AEO documents to the  
 6 Defendants--a clear violation of § 8.3. The entirety of the Nucatola Transcript was designated as  
 7 AEO, and had been the subject of much contention between Defendants and Dr. Nucatola.  
 8 Defendants never disputed this designation and acknowledge that the transcript and other Disclosed  
 9 Documents were so designated.<sup>3</sup> Exhibit A. Defendants’ only excuse is that they thought having  
 10 their experts sign the Protective Order (without notifying or providing those signed pages to  
 11 Plaintiffs) was “sufficient.” Exhibit D. But sanctions for violating discovery orders are permissible  
 12 “regardless of the reasons” for the violations. *Life Techs. Corp. v. Biosearch Techs., Inc.*, No. C-12-  
 13 00852 WHA JCS, 2012 WL 1600393, at \*10 (N.D. Cal. May 7, 2012).

14 Given the harassment and threats Plaintiffs and their employees have already suffered, the  
 15 disclosure of this protected material presents significant risk and prejudice to Dr. Nucatola and  
 16 Plaintiffs. Defendants’ response to their violation—including compounding it by circulating the  
 17 expert report and their failure to adequately respond to Dr. Nucatola’s counsel’s questions  
 18 concerning the violation—and their pattern of patent disregard for this Court’s orders, shows that  
 19 Defendants do not take their court-ordered obligations seriously and sanctions are warranted.

20 **I. THE COURT SHOULD DISQUALIFY DR. SMITH AND EXCLUDE HIS  
 21 EXPERT REPORT**

22 Because Defendants’ disclosure prejudiced Plaintiffs and Dr. Nucatola, and the Nucatola  
 23 Transcript is integral to Dr. Smith’s conclusions, Dr. Smith should be disqualified and his expert  
 24 report should be excluded.

25 Rule 37 allows courts to preclude a violating party “from introducing designated matters

26 <sup>3</sup> Defendants conduct cannot be “excused by either claiming after the fact that the information was  
 27 improperly designated or by instructing [Defendants] to destroy all the copies of the reports he  
 28 possessed.” *Spin Master, Ltd. v. Zobmondo Entm’t, LLC*, No. CV063459ABCPLAX, 2012 WL  
 12882012, at \*4 (C.D. Cal. Feb. 13, 2012).

1 into evidence," Fed. R. Civ. Proc. 37(b)(2)(A)(ii), including expert reports and testimony, when  
 2 prejudice is shown. *See, e.g., Life Techs. Corp.*, 2012 WL 1600393 at \*11 (barring expert who  
 3 improperly received confidential information from testifying about related subjects); *Spin Master*,  
 4 2012 WL 12882012, at \*4 (striking portions of expert report based on disclosure of confidential  
 5 documents). Courts have found that a party's failure to give notice of disclosure of confidential  
 6 documents, in and of itself, may prejudice the opposing party. *See In re Incretin Mimetics Prod.*  
 7 *Liab. Litig.*, No. 13MD2452 AJB MDD, 2015 WL 1499167, at \*10 (S.D. Cal. Apr. 1, 2015)  
 8 (disqualifying expert for failure to provide notice of disclosure of confidential documents).

9 The harm to Defendants occurred when Plaintiffs failed to give notice as  
 10 contemplated by the protective order. If notice had been given to Defendants, the  
 11 issue of whether [Plaintiffs' expert] was a competitor [under the protective order]  
 12 could have been addressed proactively, thereby preventing improper disclosure.  
 13 Plaintiffs deprived Defendants of this opportunity by not giving notice.

14 *Id.* at 10. In *Allergan, Inc. v. Sandoz Inc.*, No. 2:09-CV-182, 2011 WL 2563238, at \*1 (E.D. Tex.  
 15 June 28, 2011), a case which this Court cited approvingly in *Life Technologies Corp.*, the receiving  
 16 party failed to provide notice, as required by a protective order, before disclosing confidential  
 17 information to their expert. Concluding that "condoning" the violation "would undermine the  
 18 Court's integrity and ability to enforce its own rules," the court found extreme prejudice and struck  
 19 the expert report in its entirety, in addition to ordering other limitations on the receiving party's  
 20 experts. *Id.* at \*2–3.

21 Defendants' failure to follow the ordered procedures prejudiced Plaintiffs and Dr. Nucatola.  
 22 Their violations of § 8.6 deprived Plaintiffs and Dr. Nucatola from refusing permission to provide  
 23 the Disclosed Documents to experts, vetting the background of experts prior to potentially granting  
 24 permission, or granting limited permission. Defendants' failure to provide notice similarly deprived  
 25 Plaintiffs and Dr. Nucatola of the ability to put adequate safeguards in place to ensure the  
 26 transcript's confidentiality as a condition of granting permission. Defendants' failure to request  
 27 permission directly resulted in the exact situation that § 8.6(b) contemplated--putting AEO  
 28 information into the hands of individuals who should not be seeing them. Had Defendants followed  
 the proper procedures, Plaintiffs and Dr. Nucatola would have made sure the Disclosed Documents  
 were closely monitored. And if they had followed the procedures, it is unlikely that Defendants

1 would have been in a position to violate the Protective Order even further by providing the named  
 2 Defendants with expert reports containing AEO information within the Disclosed Documents.

3 Striking Dr. Smith's report is warranted because he heavily cites and relies on the  
 4 improperly disclosed Nucatola Transcript. He cites Dr. Nucatola's testimony on 16 of the 27 pages  
 5 in the report's "Analysis and Opinions" section and explicitly quotes her testimony at least 22  
 6 times. Bomse Decl. ¶13. It is vital to three of his four opinions. If the Court does not exclude his  
 7 report completely, it should, at minimum, exclude these three opinions.

8 **II. THE COURT SHOULD IMPOSE ADDITIONAL SANCTIONS**

9 Defendants' clear violations of the Protective Order also warrant that the Court hold them in  
 10 contempt and issue monetary sanctions, including attorneys' fees for Plaintiffs and Dr. Nucatola's  
 11 attorneys. A court can hold the violator of a protective order in contempt where the violation is  
 12 "beyond substantial compliance" and "not based on a good faith and reasonable interpretation of the  
 13 [order]" and can also impose monetary sanctions, including attorney's fees, against the violator. *See*  
 14 *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir.1997); *Harmston v. City &*  
 15 *Cty. of San Francisco*, No. C 07-01186SI, 2007 WL 3306526, at \*3, \*7 (N.D. Cal. Nov. 6, 2007)  
 16 (holding violators of protective order in contempt and ordering sanctions of reasonable expenses,  
 17 including attorney's fees); *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 911 (9th Cir.  
 18 1986) (upholding district court's order of \$3,000 in sanctions for protective order violation).  
 19 Defendants are clearly not in "substantial compliance." Their violation is compounded because this  
 20 is not the first time they have violated this Court's orders. Defendants were on notice of the  
 21 importance of adequately protecting AEO information through the many motions and arguments on  
 22 the Protective Order. Yet without any adequate explanation, they failed to do so.

23 **CONCLUSION**

24 For all of the foregoing reasons, Plaintiffs respectfully request that the Court (1) exclude Dr.  
 25 Smith's expert report in its entirety or, in the alternative, exclude all portions of Dr. Smith's report  
 26 that rely on or cite to Dr. Nucatola's testimony; (2) hold Defendants' counsel held in contempt; and  
 27 (3) award monetary sanctions for Defendants' violation of the Protective Order.

1 Dated: April 22, 2019

Respectfully submitted,

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3 ARNOLD & PORTER KAYE SCHOLER LLP

4 By: /s/ Amy L. Bomse

5 Amy L. Bomse

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Attorneys for Plaintiffs